



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 89 OF 2016

(Formerly Cause No. 2270 of 2012 at Nairobi)

**KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL
INSTITUTIONS AND HOSPITALS WORKERS.....CLAIMANT**

VERSUS

P.C.E.A TUMU TUMU HOSPITAL.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 13th October, 2017)

JUDGMENT

The claimant filed the memorandum of claim on 09.11.2012 alleging failure by the respondent to pay all the terminal benefits for 67 employees who were terminated on account of redundancy as per attached list of employees. The claimant prayed for judgment against the respondent for:

- a) Reinstatement of all employees affected by redundancy without loss of benefits.
- b) In alternative to (a) the respondent to pay the affected employees their terminal benefits as attached on the memorandum of claim.
- c) The respondent to pay each employee full compensation for the loss of employment.

The matter was listed on numerous dates when parties indicated that they would record consent. On 04.05.2017 the court ordered thus, **“As parties are in agreement on some heads of award and not others, parties to file a joint computation showing agreed figures and the disagreements and file by 19.05.2017. Mention on 30.05.2017 at 9.00am for further orders on computation. Costs in the cause.”**

Subsequently parties filed consent on 12.07.2017 and partial judgment was entered and recorded in court on 18.07.2017 thus:

1. That the respondent do pay the claimants the following:
 - a) Salary in lieu of termination notice Kshs.907, 440.00.
 - b) Severance pay (outstanding balance) Kshs.156, 328.00.

c) Six months compensation Kshs. 1, 814, 880.00.

2. That this court do determine whether the following claims are payable to the claimants upon hearing submissions from the parties:

a) Salary allowance arrears.

b) Risk allowance arrears.

c) Travelling allowance arrears.

The claimant filed submissions on 16.08.2017 and the respondent filed submissions on 21.08.2017 through Kinyua Kiama & Company Advocates.

The claimant has submitted that the respondent should pay the arrears as follows:

a) Salary allowance arrears Kshs.3, 129, 771.00.

b) Risk allowance arrears Kshs.816, 000.00.

c) Travelling allowance arrears Kshs.408, 000.00.

d) House allowance arrears Kshs.739, 392.00.

e) Total Kshs. 5, 093, 163.00.

The claimant's justification for the claim is that the same was granted by the court in Cause No. 58 of 2005 between the parties and by way of the award settling new terms of service in the collective agreement between the parties. The court having awarded the same on 23.07.2008, the respondent had already terminated the employment of the 67 grievants by way of redundancy so that the award and collective agreement applied to the 67 grievants. Accordingly they should be paid per the award and the collective agreement.

The respondent has submitted that the arrears should not be granted because of the following grounds:

a) In the award dated 03.12.2008 in Cause No. 89(N) of 2008 between the parties and in a dispute about the redundancy, the court granted the grievants as per the headings in the partial consent and the award in that previous suit would thereby be fully satisfied.

b) The award in Cause 58 of 2005 between the parties was given on 23.07.2008 at a time the grievants had already been declared redundant. That award enhanced the terms of service for the respondent's employees. The award did not make the enhanced terms to apply retroactively and the grievants having left employment as at 23.07.2008, the date of the award, the enhanced terms did not apply to them.

c) In the award dated 03.12.2008 in Cause No. 89(N) of 2008 between the parties and in a dispute about the redundancy, the grievants made no prayer or claim for the arrears. Thus in the present suit seeking to enforce the award in Cause No. 89 (N) of 2008, the arrears which were not awarded by the court should not now be granted.

The court has considered the submissions and makes findings as follows:

a) The award in Cause 58 of 2005 between the parties was given on 23.07.2008 and the award enhanced the terms of service for the employees. The award does not say that the terms would apply retroactively. Section 59 (1) of the Labour Relations Act, 2007 provides that a collective agreement binds the parties for the period of the agreement. There have been no submissions by the

claimant on the period of the collective agreement whose terms of service were enhanced by the award in Cause 58 of 2005. It is therefore difficult for the court to find that the arrears as claimed would be justified under the collective agreement. In any event, the issue of the arrears as enhanced would be *res judicata* as it ought to have been urged in the earlier Cause No. 89(N) of 2008 between the parties and in a dispute about the redundancy. Further section 59(3) of the Labour Relations Act, 2007 provides that the terms of a collective agreement shall be incorporated into the contract of employment of every employee covered by the collective agreement. It is not in dispute that as at time the collective agreement whose terms were enhanced as per the Award in Cause 58 of 2005 was concluded, the grievants had already ceased to be employees by reason of their termination by redundancy – so that the ensuing terms of the collective agreement could not be incorporated in their individual contracts as provided for in the section. Accordingly, the court returns that the claimant is not entitled to the arrears as urged and in view of the material on record.

b) It is clear that the inclusion of house allowance arrears Kshs.739, 392.00 in the claimant's submissions went beyond the partial consent on record that set out the matters for determination and the court returns that the claimant is not entitled as urged.

In conclusion judgment is hereby entered in the suit with orders as follows:

a) The respondent to pay the claimant (grievants) the sum of **Kshs. 2, 878, 648.00** as per partial consent judgment and to pay by **01.12.2017** failing interest to be payable thereon at court rates from the date of this judgment till full payment.

b) In furtherance of good industrial relations between the parties, the respondent to pay the claimant's partial costs of the suit fixed at **Kshs.50, 000.00** only.

Signed, dated and delivered in court at **Nyeri** this **Friday, 13th October, 2017**.

BYRAM ONGAYA

JUDGE